IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISCELLANEOUS APPLICATION NO. 10 OF 2007

Smt. Maria P.A.A. Fernandes
Major in age, r/o Flat No.AC-1,
First Floor, Silver Towers,
Near Cine Vishant, Aquem,
Margao Goa. ... Applicant

versus

1. Shri Devendra Shankar Kenkre,
   Major, residing at House No.640,
   Thana, Cortalim, Salcete Goa.

2. State of Goa. ... Respondents

Mrs. A. A. Agni, Advocate for the Applicant.

Mr. P. A. Kamat, Advocate for the Respondent No.1.

Mr. C. A. Ferreira, Public Prosecutor for the Respondent No.2.

CORAM : N. A. BRITTO, J.

DATE : 22ND MARCH, 2007.

ORAL ORDER

Heard Mrs. A. A. Agni, the learned Counsel on behalf of the applicant/complainant and Mr. P. A. Kamat, the learned Counsel on behalf of the respondent no.1/accused.

2. The parties hereto shall be referred to in their names as they appear in the cause title of the said complaint.

3. The complainant has sought special leave to appeal against the acquittal of the accused under Section 138 of the Negotiable Instruments Act, 1881, vide Order dated 29-8-2006 of the learned CJM, Margao.

4. The dispute between the complainant and the accused is regarding a cheque bearing No.137289 dated 21-8-1998 given by the accused to the complainant drawn on Goa State Co-operative Bank, Cortalim, for the sum of Rs.10,000/-. The complainant alleged that the said cheque was issued by the accused towards money which was payable by the accused to the complainant. The complainant presented the said cheque for payment on 24-8-1998 but the same was returned with endorsement that the funds were insufficient. As per the complainant, the attorney of the complainant informed the accused about the said dishonour and the accused requested the attorney to deposit the said cheque after 15 days and when it was presented for payment, the same was returned again with endorsement that the funds were insufficient. The complainant therefore issued the statutory notice to the accused dated 29-10-1998 which was returned unclaimed and as such the complainant filed the complaint on 2-12-1998, and as the records and proceedings show, process against the accused came to be issued on 18-2-1999 and the accused appeared before the Court for the first time on 20-3-1999.

5. In support of the complaint, the complainant examined her brother and attorney and the Manager of Goa State Co-operative Bank. The accused examined himself and also examined another Manager of the same Bank. This the accused did in support of his plea that the subject cheque was issued by the accused to the complainant in the year 1995 and the evidence of DW2/Kenkre shows that the subject cheque was the second last cheque of a cheque book issued to the accused on 6-12-1995 and that the accused did not have any transaction with the Bank after 16-3-1997.

6. There is no dispute that there were series of disputes between the complainant and the accused and terms of compromise were filed on 11-9-1998 in Execution Proceedings bearing No.14/1992 before the Civil Judge, Senior Division at Vasco-da-Gama. The said Consent Terms which were accepted by Order of the Court dated 15-1-1999 show that the complainant/decree holder were paid a sum of Rs.95,000/- by D.D. dated 21-8-1998 drawn in the name of the complainant and the said sum of Rs.95,000/- were paid in lieu of a cheque dated 6-11-1997 for Rs.65,000/- and another Rs.30,000/- by way of compensation. Satisfaction of the Decree dated 31-8-1989 was also recorded and it was agreed upon that a criminal case filed by the wife of the Decree Holder would be withdrawn by a separate application. It was also agreed that another case pending before the Deputy Director of Panchayats would also be withdrawn, and it is stated on behalf of the complainant, that the said Panchayat case was subsequently withdrawn on 13-1-1999.

7. The learned CJM has come to the conclusion that the accused has succeeded in proving that the cheque in question was not towards any legally

enforceable debt and therefore has given benefit of doubt to the accused and has acquitted the accused as aforesaid.

8. The learned Counsel on behalf of the complainant submits that it was not necessary for the complainant to have indicated in the complaint as to why the cheque was issued and that the defence taken by the accused that the cheque was given by the accused to the complainant in the year 1995 towards the settlement of the said Panchayat case was not reflected in the consent terms filed in the said Execution Proceedings. The learned Counsel therefore submits that it was not for the complainant to have proved that the cheque was issued for consideration but it was for the accused to have disproved the same in the light of various pronouncements of the Supreme Court. The learned Counsel submits that the learned CJM placed the burden of disproving the presumption on the complainant. Reliance has been placed on **Hiten P. Dalal** v. **Bratindranath Banerjee**((2001) 6 SCC 16), **Goaplast(P) Ltd.** v. **Chico Ursula D'Souza and another**((2003) 3 SCC 232 and **Goa Plast(P) Ltd.** v. **Chico Ursula D'Souza**((2004) 2 SCC 235).

9. There can be no doubt about the propositions of law stated by the Apex Court in the decisions cited. As stated by the Apex Court, it is necessary for the accused at least to show on the basis of acceptable evidence either that his explanation in the written statement was so probable that a prudent man ought to accept it or to establish that the effect of the material brought on record, in its totality, rendered the existence of the fact presumed, improbable and in the absence of such proof the presumptions under Sections 138 and 139 must prevail.

10. Admittedly, Rs.95,000/- were paid by the accused to the complainant by D.D. dated 29-9-1998. The subject cheque is also dated 21-8-1998 and the complainant has been unable to offer any explanation as to why after paying Rs.95,000/- to the complainant on 21-8-1998 the accused had to pay another sum of Rs.10,000/- by way of a cheque drawn on the same date. This the complainant did not spell out in his complaint or for that matter in his evidence before the Court. However, it is interesting to note that even before the complainant was served with the statutory notice on the accused demanding the payment of Rs.10,000/- due on the said cheque, the accused by letter dated 14-10-1998(Exh. PW1/G) had called upon the complainant to return the subject undated cheque which the complainant was required to return in terms of the settlement. Although, the complainant sent a reply to this letter of the accused dated 14-10-1998, by his reply dated 29-10-1998, the complainant did not state as towards which liability the subject cheque for Rs.10,000/- was issued by the accused. It may be true that no reference was made for the return of the subject cheque in the consent terms filed on 11-9-1998 but before the said consent terms were accepted by Order dated 15-9-1999 the accused had filed an application before the learned C.J.S.D. dated 11-1-1999 stating that the complainant's Power of Attorney would take appropriate action in case the complainant misused the subject cheque for Rs.10,000/-. The complainant's attorney was well aware of this application filed on 11-1-1999 as can be seen from the endorsement made by him on the said application and as per the endorsement the complainant's Attorney undertook to withdraw all the other cases between them. The complainant's attorney accepted by virtue of the said application filed by the accused that he(the attorney) would take appropriate action against the complainant in case the latter misused the subject cheque for Rs.10,000/- and yet prosecuted the accused under Section 138 of the Act for dishonour of the said cheque.

It appears to me that the complainant's attorney wanted to take benefit of the fact that the subject cheque was not referred to in the consent terms, unmindful of the said application dated 11-1-1999 filed by the accused, copy of which he accepted without demur or murmur. The case of the accused has been consistent not only in the said letter dated 14-10-1998 which the accused sent to the complainant even before receiving the statutory notice but also in the said application dated 11-1-1999. In his evidence before the Court the accused stated that the subject cheque was issued to the complainant in the year 1995 without putting the date on the said cheque and this part of his statement is sufficiently corroborated by the evidence of the Bank Manager examined by the accused. The accused also stated that the subject cheque was given as security to withdraw the complaint against the accused for the illegal construction before the Panchayat Authorities and as pointed out on behalf of the parties the said Panchayat dispute was settled in terms of consent terms and the Panchayat case was subsequently withdrawn on 13-1-1999 inspite of the dishonour of the subject cheque. As already stated, the case of the accused was far more consistent and acceptable that the subject cheque was given as security and had to be returned to the accused as all the disputes between them were settled by payment of Rs.95,000/-, by draft dated 21-8-1998 as per consent terms.

11. As already stated, the complainant has chosen to file the present complaint only because the subject cheque was not referred to in the said consent terms. Considering the evidence produced by the accused, it was more than sufficiently proved by the accused that the subject cheque was issued without consideration and thus the accused had sufficiently rebutted the presumptions available in favour of the complainant. The acquittal of the accused therefore was justified. This is not a fit case

to grant leave to appeal but to dismiss the application with costs which are fixed at Rs.2000/- to be paid by the complainant to the accused. Order accordingly.

N. A. BRITTO, J.

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